Supreme Court, U.S.
FILED

97-161 JUL 24 1997

OFFICE OF THE CLERK
No. _____

In The

Supreme Court of the United States

October Term, 1996

MASAMI AIZAWA,

Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN; THE JAPANESE MINISTRY OF JUSTICE; THE JAPANESE MINISTRY OF FOREIGN AFFAIRS; THE SUPREME PROSECUTOR'S OFFICE OF JAPAN; THE ISHINOMAKI DISTRICT PUBLIC PROSECUTOR'S OFFICE; THE SENDAI HIGH PUBLIC PROSECUTOR'S OFFICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street
Suite 1055
San Francisco, CA 94104
(415) 274-3800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

46 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit properly denied Petitioner, a non-English speaking Japanese pro per litigant, the opportunity to file a notice of appeal and have the merits of his appeal passed upon, when it failed to direct the United States District Court for the Central District of California to either (1) enter a final judgment specifically dismissing Petitioner's action as to each and every Defendant named in the complaint (Respondents herein), including Respondent the Japanese Ministry of Justice, a juridical entity separate and distinct from Respondent the Sovereign State of Japan and its other distinct agencies and/or instrumentalities named in the complaint, or (2) comply with the mandatory judgment certification requirements of Fed. R. Civ. P. 54(b) given that its purported order of dismissal did not dismiss Petitioner's action as to Respondent the Japanese Ministry of Justice.

Whether the United States Court of Appeals for the Ninth Circuit properly failed to recognize that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance.

Whether the United States Court of Appeals for the Ninth Circuit has, to an extent calling for the exercise of this Court's supervisory power, (1) sanctioned the departure of the United States District Court for the Central District of California from the usual course of judicial proceedings when the District Court failed to both (a) respect the status of Respondent the Japanese Ministry of Justice as a juridical entity separate and distinct from

QUESTIONS PRESENTED – Continued

Respondent the Sovereign State of Japan and (b) adhere to the mandatory judgment certification requirements of Fed. R. Civ. P. 54(b), and (2) when the Ninth Circuit has itself departed from the usual course of judicial proceedings by (a) summarily affirming the District Court without considering Petitioner's opening brief, which had already been filed, in contravention of its own case law, and (b) construing Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* as a motion for reconsideration in an apparent attempt to avoid the *en banc* review procedures of Fed. R. App. P. 35, which would have required circulation of Petitioner's suggestion for *en banc* review among the Ninth Circuit's judges in regular active service.

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Contents iii

Table Of Authorities v

Opinions Below 1

Jurisdictional Statement 2

Constitutional Provisions and Statutes Involved 2

Statement Of The Case 3

Reasons For Granting The Writ 8

1. The Ninth Circuit's decision is in conflict with the intent of Congress and decisions from this Court and other circuits holding that an agency or instrumentality of a foreign sovereign is a juridical entity separate and distinct from any other such agency or instrumentality or the sovereign itself, and recognizing that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance 8

2. The Ninth Circuit's decision is in conflict with decisions of this Court and other circuits holding that the judgment certification requirements contained in Fed. R. Civ. P. 54(b) are mandatory in nature and must be strictly followed, particularly in a situation where failure to abide by the requirements would result in the loss of valuable appellate rights 13

TABLE OF CONTENTS – Continued

Page

3. The Ninth Circuit, in summarily affirming the District Court and effectively foreclosing any chance of rehearing or *en banc* review of said affirmance, has both departed from the usual course of judicial proceedings and has sanctioned such departure by the District Court to such an extent as to call for an exercise of this Court's supervisory power 16

Conclusion 18

Ninth Circuit Opinion and Judgment (April 24, 1997) .....App. 1

Order of the U.S. District Court (November 22, 1996) .....App. 2

Order of the U.S. District Court (June 26, 1996) ..App. 4

Ninth Circuit Opinion and Judgment (October 23, 1996) .....App. 5

Ninth Circuit Opinion and Judgment (June 4, 1997) .....App. 6

Fed. R. Civ. P. 54(b) .....App. 7

Ninth Circuit Rule 27-10 .....App. 10

Fed. R. App. P. 35 .....App. 11

28 U.S.C. § 1610 .....App. 13

Declaration of Petitioner Masami Aizawa (November 1, 1996) .....App. 17

Excerpt From Petitioner's Petition for Rehearing (May 8, 1997) .....App. 19

TABLE OF AUTHORITIES

Page

CASES

Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980) 13

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1983) 16

First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 9, 10, 11

Gibbons v. Republic of Ireland, 532 F.Supp 668 (D.C.D.C. 1982) 12

Hercaire International, Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987) 9

Hester International Corp. v. Federal Republic of Nigeria, 879 F.2d 170 (5th Cir. 1989) 9

International Controls Corp. v. Vesco, 535 F.2d 742 (2nd Cir. 1976) 14

Jones v. Estelle, 693 F.2d 547 (5th Cir. 1982) 13

McKesson Corporation v. Islamic Republic of Iran, 52 F.3d 346 (D.C. Cir. 1995) 9

Riggle v. California, 577 F.2d 579 (9th Cir. 1978) 15

Robinson v. Parke-Davis and Company, 685 F.2d 912 (4th Cir. 1982) 13

Ruffolo v. Oppenheimer & Co., Inc, 949 F.2d 33 (2nd Cir. 1991) 13

Sears Roebuck and Co. v. Mackey, 351 U.S. 427 (1956) 13, 14, 15

Shirey v. Bensalem Township, 663 F.2d 472 (3d Cir. 1981) 13

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Betts, 754 F.2d 1243 (5th Cir. 1985)..... 13

Wagner v. Farmers & Merchants State Bank, 787 F.2d 444 (8th Cir. 1986)..... 15

OTHER AUTHORITIES

H.R.Rep. No. 94-1487 (1976) 11

RULES AND REGULATIONS

Fed. R. App. P. 35..... 2, 7, 17

Fed. R. Civ. P. 54(b) ..... *passim*

Ninth Circuit Rule 27-10.....2, 17

STATUTES

28 U.S.C. § 1610.....2, 10

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Masami Aizawa, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed in the above entitled proceeding on April 24, 1997, and the related order filed in the above entitled proceeding on June 4, 1997, construing Petitioner's petition for rehearing as a motion for reconsideration, denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review.

OPINIONS BELOW

The opinion and judgment of the Ninth Circuit Court of Appeals dated April 24, 1997, was not reported. A copy of the opinion and judgment is reproduced in the Appendix at p. 1. The order denying Petitioner's Motion for Entry of a Final Judgment entered by the United States District Court for Central District of California on November 22, 1996, from which Petitioner's appeal to the Ninth Circuit was taken, was not reported and is reproduced in the Appendix at pp. 2-3. The original Order Dismissing Action as to Certain Defendants, entered by the United States District Court for the Central District of California on June 26, 1996, was not reported and is reproduced in the Appendix at p. 4. The order of the Ninth Circuit Court of Appeals dated October 23, 1996, dismissing Petitioner's attempted but premature appeal from the District Court's June 26, 1997, order, was not reported and is reproduced in the Appendix at p. 5. The order of the Ninth Circuit Court of Appeals dated June 4,

1997, construing Petitioner's petition for rehearing as a motion for reconsideration, denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review, was not reported. A copy of that order is reproduced in the Appendix at p. 6.

JURISDICTIONAL STATEMENT

On April 24, 1997, the Ninth Circuit Court of Appeals entered judgment and opinion summarily affirming the District Court's November 22, 1996, order denying Petitioner's Motion for Entry of a Final Judgment as moot. On June 4, 1997, the Ninth Circuit Court of Appeals entered a subsequent order construing Petitioner's petition for rehearing as a motion for reconsideration, denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review.

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals and subsequent order is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fed R. Civ. P. 54(b)

Ninth Circuit Rule 27-10

Fed. R. App. P. 35

28 U.S.C. § 1610

STATEMENT OF THE CASE

Petitioner Masami Aizawa filed his First Amended Unverified Complaint on January 6, 1995, in the United States District Court for the Central District of California, alleging jurisdiction under the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1602-1611). The causes of action stated in the complaint arose from adverse activities of Respondents the Sovereign State of Japan and five of its separate and distinct ministries, agencies and/or instrumentalities.

Respondents, the Sovereign State of Japan et al., were twice served with summons and complaint. The first service on Respondents was attempted on or about January 18, 1995. Respondents refused service by returning the documents on or about March 31, 1995. The second service was sent by the District Court on or about August 10, 1995.

On November 20, 1995, Petitioner attempted to file with the District Court a Request to Enter Default of the Respondents for their failure to timely respond to either of the services made on them. The Clerk of the District Court returned the request and did not file it because the request did not specifically name all of the Respondents. On November 28, 1995, Respondents filed their Ex Parte Application for an Order Enlarging Time to Respond to Amended Complaint to December 11, 1995. U.S. Magistrate Judge Brian Quinn Roberts granted the application on November 30, 1995. On December 1, 1995, Petitioner once again attempted to file his Request to Enter Default of the Respondents. This time, the request specifically mentioned all six (6) of the named Respondents. The

Clerk of the District Court, however, again refused to file the request, this time on the ground that the Respondents had already been granted an extension of time to respond to the complaint. On December 11, 1995, Respondents filed a Motion to Dismiss Petitioner's action for lack of jurisdiction under the Foreign Sovereign Immunities Act, along with a supporting Memorandum of Points and Authorities. Petitioner filed an opposition to this motion on February 12, 1996, and Respondents filed a response to the opposition on or about February 16, 1996.

Respondents' Motion to Dismiss was heard before the District Court on June 24, 1996. Counsel for both Petitioner and Respondents appeared telephonically. The District Court ostensibly purported to grant Respondents' Motion to Dismiss the action as to "all named defendants." This is what the minute order from the June 24, 1996, hearing indicated.

The actual order of dismissal, however, differed substantially from the minute order in that it only dismissed the action as to "certain defendants." Appendix p. 4. The list of "certain defendants" did not include the Japanese Ministry of Justice – a juridical entity separate and distinct from the other Respondents named in the complaint. The actual order of dismissal was entered on June 26, 1996, and did not contain the required certification under Fed. R. Civ. P. 54(b). Fed. R. Civ. P. 54(b) has been reproduced and is included in the Appendix at pp. 7-9.

Undersigned counsel's legal representation of Petitioner ceased immediately after the June 24, 1997, hearing. See the Declaration of Masami Aizawa filed in the District Court in support of Appellant's Motion for Entry

of a Final Judgment, Appendix pp. 17-18. Petitioner represented himself in handling the appeal, and filed the notice of appeal from the June 26, 1996, order himself on August 20, 1996. Appendix p. 17.

The Ninth Circuit dismissed Petitioner's appeal of the June 26, 1996, order in an order dated October 23, 1996, on the ground that the notice of appeal was filed after the 30-day period in Fed. R. App. P. 4(a)(1) had expired. Appendix p. 5. In actuality, however, Petitioner's first appeal was a nullity because the District Court had not yet entered a final judgment in compliance with the mandatory certification requirements of Fed. R. Civ. P. 54(b). If anything, then, Petitioner's notice of appeal was premature rather than too late.

Petitioner is a non-English speaking Japanese citizen who does not understand the U.S. legal system and is easily confused by U.S. court procedures. Appendix p. 18. Petitioner was confused by the District Court's June 26, 1996, order which only dismissed his action as to "certain defendants" and not as to the Japanese Ministry of Justice. Appendix p. 17.

On or about November 7, 1996, Petitioner filed his Motion for Entry of a Final Judgment in the District Court wherein he requested the court to enter a final judgment either pursuant to Fed. R. Civ. P. 54(b) or dismissing all claims as to all parties so that he could pursue his appeal in the Ninth Circuit. The District Court denied the motion as "moot" in an order dated November 22, 1996, on the apparent grounds that (1) it had intended to dismiss the action as to all Respondents in its June 26, 1996, order of dismissal, even though not all of the Respondents had

actually been dismissed, and (2) its dismissal of the action as to Respondent the Sovereign State of Japan had the effect of dismissing the action as to Respondent the Japanese Ministry of Justice (the party omitted from the June 26, 1996, order of dismissal), on the theory that the Japanese Ministry of Justice was "merely a part" of the Sovereign State of Japan rather than a distinct juridical entity. Appendix pp. 2-3.

On December 17, 1996, Petitioner filed a timely Notice of Appeal of the District Court's November 22, 1996, order denying his Motion for Entry of a Final Judgment. On February 26, 1997, the Ninth Circuit filed an order to show cause why the appeal should not be disposed of summarily. Petitioner filed a response to the Court's order on March 12, 1997, and a supplemental response on March 13, 1997. Respondents submitted their filing pursuant to this Court's February 26, 1997, order on or about March 24, 1997, and Petitioner filed a reply thereto on March 31, 1997.

On April 18, 1997, Petitioner filed his opening brief in the above entitled case, but on April 24, 1997, the Ninth Circuit entered an order summarily affirming the District Court, apparently without considering Petitioner's opening brief or his March 31, 1997, reply to Respondents' March 24, 1997, filing. Appendix p. 1.

On May 8, 1997, Petitioner filed his Petition for Rehearing and Suggestion for Rehearing *En Banc*, wherein he generally asserted that the Ninth Circuit, in entering its judgment, had committed two grave errors with respect to issues of exceptional importance in failing

to uphold the mandatory judgment certification requirements of Fed. R. Civ. P. 54(b) and in failing to acknowledge and respect the status of Respondent the Japanese Ministry of Justice as a separate juridical entity. Petitioner also pointed out to the Ninth Circuit that it had failed to follow its own decisions requiring it to consider Petitioner's opening brief in deciding whether to summarily affirm the District Court. The pages from Petitioner's Petition for Rehearing containing this latter argument have been reproduced and are included in the Appendix at pp. 19-20.

On June 4, 1997, the Ninth Circuit filed an order construing Petitioner's Petition for Rehearing as a motion for reconsideration under Circuit Rule 27-10 (which has been reproduced and included in the Appendix at pp. 10-11), denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review. Appendix p. 6. This was apparently done in an attempt to avoid review of the Petition and a vote upon the appropriateness of *en banc* review by the Ninth Circuit's regular active judges under the procedures set forth in Fed. R. App. P. 35 (which has been reproduced and included in the Appendix at pp. 11-12). While these procedures require a majority of regular, active circuit judges to order *en banc* review, this entire process appears to have been effectively bypassed due to the Ninth Circuit's construction of Petitioner's Petition for Rehearing as a motion for reconsideration; under Fed. R. App. P. 35, the *en banc* review process only applies to hearings and rehearings, but not to motions for reconsideration. See Appendix p. 11. Thus, in all likelihood, the 40 extra copies of the Petition for Rehearing and Suggestion for Rehearing *En Banc* filed by Petitioner

were never circulated to the Ninth Circuit's regular, active judges, who were thus never even made aware of the grave errors committed by the Court in affirming the District Court's November 22, 1996, order.

As discussed in the Reasons for Granting the Writ below, the effect of the foregoing errors committed by the District Court and the Ninth Circuit has been to unjustly deprive Petitioner of his valuable appellate rights. We urge upon this Court that as a non-English speaking pro per litigant, Petitioner is especially deserving of the opportunity to have the merits of his case passed upon by the Ninth Circuit. Appendix pp. 17-18.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision is in conflict with the intent of Congress and decisions from this Court and other circuits holding that an agency or instrumentatity of a foreign sovereign is a juridical entity separate and distinct from any other such agency or instrumentality or the sovereign itself, and recognizing that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal signifcance.

Petitioner's First Amended Unverified Complaint filed in the District Court on January 6, 1995, was brought against Respondent the Sovereign State of Japan and the following five (5) distinct agencies and/or instrumentalities of Japan: The Japanese Ministry of Justice, the Japanese Ministry of Foreign Affairs, the Supreme Prosecutor's Office of Japan, the Ishinomaki District Public

Prosecutor's Office, and the Sendai High Public Prosecutor's Office. The District Court's June 26, 1996, Order Dismissing Petitioner's Action as to Certain Defendants, in contrast, only dismissed Petitioner's action as to five (5) of the above six (6) Respondents. Petitioner's action conspicuously remained undismissed as to Respondent the Japanese Ministry of Justice. Appendix p. 4.

The District Court later addressed its failure to dismiss Petitioner's action as to Respondent the Japanese Ministry of Justice in its November 22, 1996, order wherein it asserted that Respondent the Japanese Ministry of Justice "was dismissed along with all of the other agencies of the Japanese government" in its June 26, 1996, order because the Japanese Ministry of Justice was "merely a part of" Appellee the Sovereign State of Japan. Appendix pp. 2-3. In so holding, the District Court, as well as the Ninth Circuit via the summary affirmance, contravened established precedent from this Court and other circuits holding that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) (*"Bancec"*); *Hester International Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989); *McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346, 351 (D.C. Cir 1995); *Hercaire International, Inc. v. Argentina*, 821 F.2d 559, 564 (11th Cir. 1987).

This Court in *Bancec* drew upon both international law and federal common law in arriving at the above holding, noting that:

> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations . . . leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

462 U.S. at 626, 627.

This Court also found support holding for its holding in the Foreign Sovereign Immunities Act itself, noting that Congress, in enacting 28 U.S.C. § 1610(b) (the provision of the Act dealing with the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government – see Appendix pp. 13-16), "clearly expressed its intention that duly created instruments of a foreign state are to be accorded a presumption of independent status." *Id.* at 627. This point is amply illustrated by the following quote from the provision's legislative history:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling

> reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. . . . H.R.Rep. No. 94-1487, pp. 29-30 (1976), U.S.Code Cong. & Admin.News 1976, pp. 6628-6629 (citation omitted).

Id. at 627, 628.

Thus, had Petitioner obtained a judgment against Respondent the Japanese Ministry of Foreign Affairs and the other four (4) Respondents who were actually listed in the District Court's June 26, 1996, Order Dismissing Action as to Certain Named Defendants, this judgment would not have listed and therefore would not have been enforceable against Respondent the Japanese Ministry of Justice. Contrary to the decisions of the District Court and the Ninth Circuit below, then, the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance, and cannot be cured with the summary assertion that the instrumentality is indistinct from the sovereign itself. It is not. The District Court therefore ran afoul of this Court's *Bancec* decision, the above-cited circuit court decisions, and the unequivocal intent of Congress when it stated in its November 22, 1996, order that "the Ministry of Justice is merely a part of 'The Sovereign State of Japan' and was dismissed along with all of the other agencies of the Japanese government" in its June 26, 1996, order. Appendix pp. 2-3. It was not. By summarily affirming the District Court in its April 24, 1997, order, the Ninth Circuit placed its stamp of approval on this

grave error of tremendous legal significance, namely, it failed to acknowledge the legal status of the Japanese Ministry of Justice as a separate juridical entity.

As the United States District Court for the District of Columbia put it in *Gibbons v. Republic of Ireland*, 532 F.Supp. 668, 671 (D.C.D.C. 1982):

> It is evident from the Act that Congress contemplated that an action could be brought against either a foreign state or one of its instrumentalities depending on the circumstances but that a foreign state should not be automatically subject to suit for the actions of one of its instrumentalities. If this were not the case little purpose would be served by specifically providing for suits against an instrumentality and the distinctions drawn in the Act between the sovereign and and its instrumentalities would be largely superfluous.

Thus, the Ninth Circuit's decision below is in direct conflict with an Act of Congress.

In addition, it is significant to point out that Petitioner specifically and intentionally drafted his complaint to include the Japanese Ministry of Justice as a separate and distinct party to the action. In construing Petitioner's complaint for purposes of Respondents' dismissal motion, the District Court was required to treat this specific designation by Petitioner as true and correct.

2. The Ninth Circuit's decision is in conflict with decisions from this Court and other circuits holding that the judgment certification requirements contained in Fed. R. Civ. P. 54(b) are mandatory in nature and must be strictly followed, particularly in a situation where failure to abide by the requirements would result in the loss of valuable appellate rights.

It is hornbook law under the Federal Rules of Civil Procedure that a district court order which disposes of fewer than all of the claims in an action, or the rights and liabilities of fewer than all of the parties to the action, is not a final judgment absent express Rule 54(b) certification by the district court. *Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427, 435 (1956). As alluded to in the above Statement of the Case, here the District Court's June 26, 1996, order fell within the ambit of Rule 54(b) because it failed to dismiss Petitioner's action as to all six (6) of the Respondents herein, as the order did not list Respondent the Japanese Ministry of Justice. Since this order was not certified under Rule 54(b), it was not a final judgment. Appendix pp. 4, 7-9. The Ninth Circuit's summary affirmance of the District Court's denial of Petitioner's Motion for Entry of a Final Judgment is therefore in conflict with this Court's decision in *Sears*, as well as reported decisions from other circuits. *Ruffolo v. Oppenheimer & Co., Inc.*, 949 F.2d 33, 35, 36 (2nd Cir. 1991); *Robinson v. Parke-Davis and Company*, 685 F.2d 912, 913 (4th Cir. 1982); *Shirey v. Bensalem Township*, 663 F.2d 472, 475 (3d Cir. 1981); *Thompson v. Betts*, 754 F.2d 1243 (5th Cir. 1985); *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1374 (5th Cir. 1980) [holding that Rule 54(b) applies to

orders of dismissal even if "based on jurisdictional or immunity grounds . . . " under the Foreign Sovereign Immunities Act].

Rule 54(b)'s certification requirements are straightforward. They are twofold: (1) The District Court must make an express determination that there is no reason to delay entering final judgment, and (2) it must expressly direct entry of final judgment. Appendix p. 7. Here, the District Court's June 26, 1996, Order Dismissing Petitioner's Action as to Certain Named Defendants failed to meet either of these requirements. It failed to meet the first certification requirement because it contained no express determination that there was no reason to delay entering a final judgment as to the five (5) Respondents as to whom Petitioner's action was actually dismissed, i.e., all of the Respondents other than the Japanese Ministry of Justice. The second certification requirement was also not met because the order did not expressly direct entry of a final judgment under Rule 54(b). The District Court instead purported to enter judgment under Rule 54(a). Appendix p. 4.

Both defects in the District Court's June 22, 1996, order were fatal. As the Second Circuit has noted, strict compliance with Rule 54(b) is "a matter of the greatest importance." *International Controls Corp. v. Vesco*, 535 F.2d 742, 747 (2nd Cir. 1976). This is because the certification requirements of Rule 54(b) are designed to provide litigants in federal court with certainty with respect to the time for filing a notice of appeal. As this Court has observed in *Sears*, 351 U.S. at 435:

> A party adversely affected by a final decision thus knows that his time for appeal will not run against him until this [Rule 54(b)] certification has been made.

It necessarily follows from the above that Petitioner's attempted appeal to the Ninth Circuit on August 20, 1996, from the District Court's June 26, 1996, order of dismissal was actually premature rather than too late as stated in the Ninth Circuit's October 23, 1996, order. Appendix p. 5. Indeed, Petitioner's time for filing a notice of appeal has not still not yet commenced to run. The time will not commence until the district court either complies with the certification requirements of Rule 54(b), or dismisses the action as to all named defendants. *Sears*, 351 U.S. at 435-436; *Wagner v. Farmers & Merchants State Bank*, 787 F.2d 444, 445 (8th Cir. 1986).

While it is true that there is some decisional authority in the Ninth Circuit and the other circuits for the proposition that the mandatory certification requirements of Rule 54(b) can be waived, these cases are strictly limited to situations where such waiver would not result in the loss of valuable appellate rights. In *Riggle v. California*, 577 F.2d 579, 581 n.* (9th Cir. 1978), for instance, the Ninth Circuit waived the Rule 54(b) certification requirements in a situation where both parties were already before the Court and had already briefed the appeal without mention of Rule 54(b). Under these circumstances, waiver of the certification requirements did not deprive either party of the right to litigate the appeal, and only served the interests of conserving judicial resources. The Ninth Circuit was careful to point out in *Riggle*, however, that

waiver of Rule 54(b)'s certification requirements is normally not warranted:

> Under normal circumstances, we would dismiss this appeal because the order dismissing the State of California does not contain the determination of finality required by Fed.R.Civ.P. 54(b)

Id.

In the present case, waiver of Rule. 54(b)'s certification requirements is not warranted because such waiver would only operate to deprive Petitioner of his right to litigate the merits of his appeal. Moreover, Petitioner respectfully submits that such waiver would conflict with the policy enunciated by this Court in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1983), a case involving Fed. R. Civ. P. 58, that the Federal Rules of Civil Procedure "should be interpreted to prevent loss of the right to appeal, not to facilitate loss."

3. The Ninth Circuit, in summarily affirming the District Court and effectively foreclosing any chance of rehearing or *en banc* review of said affirmance, has both departed from the usual course of judicial proceedings and has sanctioned such departure by the District Court to such an extent as to call for an exercise of this Court's supervisory power.

The District Court departed substantially from the usual course of judicial proceedings by blatantly ignoring both the Federal Rules of Civil Procedure and the legal status of Respondent the Japanese Ministry of Justice as a separate juridical entity, as discussed above. By summarily affirming the District Court in its April 24, 1997,

order, the Ninth Circuit sanctioned this substantial departure. This summary affirmance by the Ninth Circuit in and of itself calls for an exercise of this Court's supervisory power.

To make matters worse, the Ninth Circuit itself made substantial additional departures from the usual course of judicial proceedings. For one thing, it failed to consider Petitioner's opening brief, in contravention of its own case law, in deciding whether to summarily affirm the District Court's November 22, 1996, order. See the Ninth Circuit's April 24, 1996, order in the Appendix at p. 1. The order indicates that the Ninth Circuit did not take into consideration Petitioner's opening brief, which had already been filed on April 18, 1997, in arriving at its decision to summarily affirm the District Court. This point was raised in Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc*. An excerpt from the Petition for Rehearing containing this Argument is contained in the Appendix at pp. 19-20. In addition, the Ninth Circuit also construed Petitioner's Petition for Rehearing as a motion for reconsideration under Ninth Circuit Rule 27-10 in an apparent attempt to bypass the procedures set forth in Fed. R. App. P. 35, which call for distribution of copies of the Petition for Rehearing to all regular active circuit judges so they can vote on the appropriateness of *en banc* review. Appendix at pp. 10-12.

While the above substantial procedural departures may be attributable in part to the same work overloads and long backlogs facing the Ninth Circuit which are also responsible for the current proposal to split the Ninth Circuit into two separate circuits, Petitioner urges upon this Court that this is not a sufficient reason to deprive

him of his valuable appellate rights. (Indeed, undersigned counsel has had other cases summarily disposed of by the Ninth Circuit for this very reason). All Petitioner, a non-English speaking pro per litigant, asks is that this Court exercise its supervisory powers in a way which will grant him the opportunity to which he is entitled to file a notice of appeal and have the merits of his appeal passed upon by the Ninth Circuit.

CONCLUSION

The Petitioner requests review before this Court in order to resolve the conflict between the Ninth Circuit's April 24, 1997, decision and cases from this Court and other circuits (1) recognizing that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance, and (2) requiring strict compliance with the judgment certification requirements of Fed. R. Civ. P. 54(b), in order to preserve certainty with respect to the finality of judgments, in cases where the District Court's order disposes of fewer than all claims as to all parties. These issues are of tremendous legal significance and have far-reaching implications for litigants in federal court nation wide.

Petitioner further requests review of the substantial departures from the usual course of judicial proceedings both sanctioned and committed by the Ninth Circuit, as outlined above.

The Petition for certiorari should be granted.

Respectfully submitted,

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street, Suite 1055
San Francisco, CA 94101
(415) 274-3800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MASAMI AIZAWA, Plaintiff/Appellant, vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants/Appellees.	) No. 97-55093)) DC# CV-94-2401-HLH) Central California)) ORDER)) (Filed Apr. 24, 1997)

Before: BROWNING, THOMPSON and HAWKINS, Circuit Judges

A review of the record and appellant's response to this court's order to show cause indicates that the questions raised in this appeal are so insubstantial as not to need further argument. *See United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam). Accordingly, we summarily affirm the district court's decision. All pending motions are denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 94-2401 HLH Date Nov. 22, 1996

Title Aizawa v. The Sovereign State of Japan.

DOCKET ENTRY

PRESENT:

HON. HARRY L. HUPP, Judge

Milli Borgarding
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: **ATTORNEYS PRESENT FOR DEFENDANTS**

PROCEEDINGS: Order denying motion filed 11/8/96.

ORDER (also, if applicable, findings and memorandum opinion):

The motion of plaintiff filed 11/8/96 requesting entry of final judgment is denied as moot. Final judgment in this matter was entered on June 26, 1996, dismissing the action as to all defendants then left in the case.

Plaintiff states that the court neglected to specifically name the Ministry Of Justice of Japan in the order dismissing this action, and that therefore the action is still alive. However, the Ministry of Justice is merely a part of

"The Sovereign State of Japan" and was dismissed along with all of the other agencies of the Japanese government. This was made clear in the minute order of June 24, 1996, which made it clear that the action was dismissed as to Japan, and all of its agencies, by reason of sovereign immunity.

Since the motion filed Nov. 8, 1996, is based on an incorrect premise (that the action has not long since been disposed of in this court), the motion is denied. The matter is removed from the court's calendar of Dec. 16, 1996.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MASAMI AIZAWA, Plaintiff, v. THE SOVEREIGN STATE OF JAPAN, et al., Defendants.	No. CV94-2401-HLH (RCx) ORDER DISMISSING ACTION AS TO CERTAIN DEFENDANTS (Filed Jun. 24, 1996) (Entered Jun. 26, 1996)

This action is dismissed with prejudice as to defendants The Sovereign State of Japan, The Japanese Ministry of Foreign Affairs, The Supreme Prosecutor's Office of Japan, the Ishinomaki District Public Prosecutor's Office. The Sendai High Public Prosecutor's Office, and Does 1 through 100 inclusive.

This Order is a final judgment for purposes of Fed.R.Civ.P. 54(a). It shall be entered pursuant to Fed.R.Civ.P. 58 and 79(a), and served upon the parties.

IT IS SO ORDERED.

Date: June 24, 1996.

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MASAMI AIZAWA, Plaintiff-Appellant, vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants-Appellees.	)	No. 96-56327 DC# CV-94-02401-HLH Central California (Los Angeles) ORDER (Filed Oct. 23, 1996)

Before: BEEZER, KOZINSKI and KLEINFELD, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *Sees Fed. R. App. P. 4(a)(1). Alexander v. Sacha*, 439 F.2d 742 (9th Cir. 1971) (requirement of the timely notice of appeal is jurisdiction). All pending motions are denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MASAMI AIZAWA, Plaintiff/Appellant, vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants/Appellees.	) No. 97-55093)) DC# CV-94-2401-HLH) Central California)) ORDER)) (Filed Jun. 4, 1997)

Before: BROWNING, THOMPSON and HAWKINS, Circuit Judges

Appellant's petition for rehearing is construed as a motion for reconsideration of this court's April 24, 1997 order. So construed, the motion for reconsideration is denied. *See* 9th Cir. R. 27-10. The suggestion for rehearing en banc is rejected. *See* General Order § 6.11.

VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the

party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without record to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judgment under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

CIRCUIT RULE 27-10
MOTIONS FOR RECONSIDERATION

Unless the time is shortened or enlarged by order of this court, a motion for clarification, reconsideration, or rehearing of an order entered by a motions panel must be filed within 14 days of the date of the order, except a prisoner not represented by an attorney shall have 28 days.

A motion for clarification, reconsideration or rehearing of an order issued by an appellate commissioner shall be decided by a motions panel unless the appellate commissioner grants reconsideration of the order. Such a motion must be filed within 14 days from entry of the appellate commissioner's order, except that a prisoner not represented by an attorney shall have 28 days.

A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

No answer to a motion will be filed unless requested by the court, but ordinarily the court will not grant a motion without such a request.

A party may file only one motion for clarification, reconsideration or rehearing of an order entered by a motions panel. The motion's format shall be governed by Circuit Rule 32(a)-(e). Except by permission of the Court, a motion for clarification, reconsideration or rehearing shall not exceed 10 monotype, double-spaced pages or

2,800 words and shall be accompanied by a certificate of compliance as described at Rule 32(e)(4).(rev. 1/97)

* * *

FRAP 35
DETERMINATION OF CAUSES BY THE COURT EN BANC

(a) When hearing or rehearing en banc will be ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a party for hearing or rehearing en banc. A party may suggest the appropriateness of a hearing or rehearing en banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard en banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for suggestion of a party for hearing or rehearing en banc; suggestion does not stay mandate. If a party desires to suggest that an appeal be heard initially en banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing en banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(d) Number of Copies – The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Dec. 1, 1994.)

* * *

§ 1610. Exceptions to the Immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not

immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(Added Pub.L. 94-583 § 4(a), Oct. 21, 1976, 90 Stat. 2896, and amended Pub.L. 100-640, § 2, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669 § 3, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(9), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(b), Apr. 24, 1996, 110 Stat. 1243.)

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street, Suite 1055
San Francisco, CA 94104
Telephone: (415) 274-3800

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MASAMI AIZAWA, Plaintiff/Appellant vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants/Appellee.	Case No. CV 94-2401 HLH (RCX)

1. I am Masami Aizawa, the plaintiff [sic] the above-captioned case. I am a Japanese national born and raised in Japan and have lived the majority of my life in Japan.

2. My legal representation with my counsel Mr. Ord terminated at the time this Court issued its Order Dismissing Action as to certain defendants. This was on June 26, 1996. Thereafter, I was representing myself.

3. I filed the Notice of Appeal myself.

4. I was confused about the above order, which dismissed the action as to only certain defendants and not the Japanese Ministry of Justice.

5. I am not familiar with the legal procedures and my English is not good at all, especially dealing with any legal vocabulary, the rules or the procedures of this Court or the higher Court. I find the entire situation very confusing.

6. I asked the Court's help to finalize the matter and give me my opportunity to have my case reviewed by the higher court.

7. I declare that this declaration has been read to me in excellent, clear Japanese by a person Fluent in English, and I fully understand the English text.

This declaration is made on the basis of personal knowledge and is believed to be true and correct, and is made under declaration of penalty of perjury.

Executed this 1st day of November, 1996, at San Gabriel, California.

/s/ Masami Aizawa
MASAMI AIZAWA

* * *

ARGUMENT

I. THIS COURT MUST GRANT THE PETITION FOR REHEARING BECAUSE THE COURT OSTENSIBLY DID NOT LOOK AT OR CONSIDER APPELLANT AIZAWA'S OPENING BRIEF, WHICH HAD ALREADY BEEN FILED, IN ARRIVING AT ITS DECISION TO SUMMARILY AFFIRM THE DISTRICT COURT AND DISMISS THE APPEAL. THE FAILURE TO CONSIDER APPELLANT AIZAWA'S OPENING BRIEF IS IN CONFLICT WITH THIS COURT'S DECISIONS IN PAGE AND HOOTON, WHICH REQUIRE SUMMARY AFFIRMATION TO BE BASED UPON AN EXAMINATION OF THE OPENING BRIEF.

As indicated above, this Court's April 24, 1997, order summarily affirming the DC appears to show that this Court did not look at or consider Appellant's opening brief in arriving at its decision. The brief, however, was available to this Court for consideration as it had been filed on April 18, 1997. Under *Hooton*, 693 F.2d 857, 858 (9th Cir. 1982), and *Page*, 356 F.2d 337, 339 n.1 (9th Cir. 1966), this Court was required to examine Appellant's opening brief and make a determination that the outcome of the current appeal was beyond dispute before summarily affirming the DC. Because it failed to do so and because the issues herein are clearly not beyond dispute, the petition must be granted.

In *Page*, this Court held:

> Motions to affirm should be made only after the appellant's brief is on file and only where, as here, the insubstantiality of the questions raised

> on appeal is clearly ascertainable from an examination of the record and the opening brief.

356 F.2d at 339 n.1.

In *Hooton*, the case cited by this Court in its April 24, 1997, order, a convicted criminal defendant appealed the district court's denial of his Rule 35 (Federal Rules of Criminal Procedure) motion for reduction of sentence, and filed a one page opening brief in this Court. 693 F.2d at 858. Not surprisingly, this Court summarily affirmed the district court because the insubstantiality of the appeal appeared from the face of Appellant's brief. *Id.* at 859. This Court also pointed out that the appeal was entirely without merit because the "Rule 35 motion [was] essentially a plea for leniency and [was] addressed to the sound discretion of the district court." *Id.*

Here, in contrast, any fair reading of Appellant's opening brief, which is 23 pages in length, reveals that the issues herein are far from insubstantial. As will be discussed further below, the opening brief raises several issues of exceptional importance which were were [sic] apparently overlooked by this Court. Moreover, unlike Federal Criminal Rule 35 at issue in *Hooton*, the madatory certification requirements of F.R.C.P. 54(b) at issue herein *are not within the sound discretion* of the district court. Neither is the reality that the Japanese Ministry of Justice is a separate juridical entity which the District Court was required *to list separately* in its June 26, 1996, order of dismissal if the order was to have the effect of dismissing Aizawa's action as to that particular entity.

* * *

Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MASAMI AIZAWA,
Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

WILLIAM A. BRADFORD, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5660
Counsel for Respondents

* Counsel of Record

QUESTION PRESENTED

Petitioner filed an untimely notice of appeal from an order of the district court dismissing this case with prejudice on the basis of foreign sovereign immunity, and the Ninth Circuit dismissed his appeal for lack of jurisdiction.

The question presented is whether the district court's order granting dismissal was final and appealable, even though one party was inadvertently omitted from the list of parties as to which dismissal was granted, where it is clear from the record that the district court intended the dismissal order to be its final order in the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

COUNTERSTATEMENT 2

REASONS FOR DENYING THE WRIT 7

CONCLUSION 17

APPENDIX:

Order of the United States District Court for the Central District of California, dated June 24, 1996

TABLE OF AUTHORITIES

Page

CASES:

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 3
Bankers Trust Co. v. *Mallis*, 435 U.S. 381 (1978) 8
Behring Int'l, Inc. v. *Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979) 15
Browder v. *Director, Dep't of Corrections*, 434 U.S. 257 (1978) 5
Burgett v. *Texas*, 389 U.S. 109 (1967) 8
Chiari v. *City of League City*, 920 F.2d 311 (5th Cir. 1991) 9
F. & H.R. Farman-Farmian Consulting Eng'rs Firm v. *Harza Eng'g Co.*, 882 F.2d 281 (7th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990) 9
Fiataruolo v. *United States*, 8 F.3d 930 (2d Cir. 1993) 9
First Nat'l City Bank v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 14
FirsTier Mortgage Co. v. *Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991) 8
Gerritsen v. *De La Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987) 10, 15
Gibbons v. *Republic of Ireland*, 532 F. Supp. 668 (D.D.C. 1982) 14
Hasbrouck v. *Texaco, Inc.*, 879 F.2d 632 (9th Cir. 1989) 13
Hercaire Int'l, Inc. v. *Argentina*, 821 F.2d 559 (11th Cir. 1987) 14
Hester Int'l Corp. v. *Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989) 14
Martinez v. *Winner*, 771 F.2d 424 (10th Cir. 1985), *vacated & remanded*, 475 U.S. 1138 (1986), *vacated as moot*, 800 F.2d 230 (10th Cir. 1986) 15
McKesson Corp. v. *Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996) 14
National Distrib. Agency v. *Nationwide Mut. Ins. Co.*, 117 F.3d 432 (9th Cir. 1997) 9
Ryder v. *United States*, 515 U.S. 177 (1995) 14
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 3

TABLE OF AUTHORITIES -- Continued

	Page
Spain v. *Gallegos*, 26 F.3d 439 (3d Cir. 1994)	9
Tucker v. *Whitaker Travel, Inc.*, 620 F. Supp. 578 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1140 (3d Cir.) (table), *cert. denied*, 479 U.S. 986 (1986)	15
Unidyne Corp. v. *Aerolineas Argentinas*, 590 F. Supp. 398 (E.D. Va. 1984)	15
Witherspoon v. *White*, 111 F.3d 399 (5th Cir. 1997)	11
STATUTES:	
28 U.S.C. § 1291	8
Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611	3
28 U.S.C. § 1603	14
28 U.S.C. § 1603(b)	15
28 U.S.C. § 1604	3
28 U.S.C. § 1605	3
28 U.S.C. § 1608	14
RULES:	
9th Cir. R. 27-10	16
Fed. R. App. P. 4(a)(1)	5
Fed. R. Civ. P. 54(a)	11
Fed. R. Civ. P. 54(b)	12
Fed. R. Civ. P. 58	8
Fed. R. Civ. P. 60(a)	13
S. Ct. R. 10(a)	7
S. Ct. R. 14.1(*i*)(ii)	5
OTHER AUTHORITY:	
Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.17 (7th ed. 1993)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-161

MASAMI AIZAWA,

Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

Respondents the Sovereign State of Japan, the Japanese Ministry of Justice, the Japanese Ministry of Foreign Affairs, the Supreme Prosecutor's Office of Japan, the Ishinomaki District Public Prosecutor's Office, and the Sendai High Public Prosecutor's Office respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

In what amounts to making to a last second "Hail Mary" pass, petitioner has seized upon a what was obviously an unintentional clerical error in an order entered by the district court in an effort to stave off the

consequences of his failure to file a timely notice of appeal from the court's final judgment. Both of the courts below have considered the issue that petitioner now brings to this Court and found it meritless. Because that assessment is correct, and because this case presents none of the factors that typically prompt this Court's exercise of its certiorari jurisdiction, review of the Ninth Circuit's decision in this case is clearly unwarranted.

Following the district court's dismissal of petitioner's suit against respondent the Sovereign State of Japan and several of its Ministries and Offices on the ground of foreign sovereign immunity, petitioner filed an untimely notice of appeal, and the Ninth Circuit dismissed the appeal for lack of jurisdiction. Petitioner now maintains that the district court never entered a final judgment—and hence that the time to appeal never began to run—because one of the district court's orders related to its dismissal of the case failed to list one of the respondents, the Japanese Ministry of Justice. As shown below, however, it was abundantly clear to all concerned that the district court intended to, and did, dismiss the case as to all parties.

Following the dismissal of his appeal by the Ninth Circuit, petitioner—citing for the first time the district court's omission of the Ministry of Justice in its order—returned to the district court and asked for the entry of final judgment. The district court rejected the request on the ground that final judgment had already been entered and the Ninth Circuit summarily affirmed that decision on appeal in an unpublished order. Petitioner now seeks review by this Court.

COUNTERSTATEMENT

Petitioner commenced this action in the United States District Court for the Northern District of California on April 13, 1994, naming as defendants respondent the Sovereign State of Japan, two Assistant United States Attorneys—Lawrence S. Middleton and Terrance A.

Bowers—and 100 fictitious parties, "Does 1-100." *See* Plaintiff's Unverified Complaint For Money Damages. On January 6, 1995, petitioner filed an amended complaint adding five Japanese Ministries and Offices and dropping Middleton and Bowers as defendants. *See* Plaintiff's First Amended Unverified Complaint. The five Ministries and Offices were respondents the Japanese Ministry of Justice, the Japanese Ministry of Foreign Affairs, the Supreme Prosecutor's Office of Japan, the Ishinomaki District Public Prosecutor's Office, and the Sendai High Public Prosecutor's Office. *Id.* ¶ 4.

In his complaint, petitioner—a Japanese national residing in California, *id.* ¶ 3—asserted several claims, all of which were said to have arisen from an alleged conspiracy between respondents and the United States Attorney's Office for the Central District of California to have petitioner extradited to Japan. *Id.* ¶¶ 9-10. Years ago petitioner was convicted of violating Japan's Public Office Election Laws, *id.* ¶¶ 11, 12, but he alleged that these were non-extraditable offenses. *Id.* ¶ 9.

On December 11, 1996, the nonfictitious respondents —*all* of the nonfictitious respondents, including the Ministry of Justice—moved to dismiss the case for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611.[1] *See* Defen-

---

[1] Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604, unless one of the FSIA's enumerated exceptions applies, *see id.* § 1605. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Thus, "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

In *Nelson* this Court held that a claim based on alleged torture and detention by the Saudi government did not establish jurisdiction under the FSIA, explaining that foreign sovereigns have immunity with respect to the exercise of powers peculiar to sovereigns as distinct from those powers that can also be exercised

dants' Notice of Motion and Motion to Dismiss Complaint Pursuant to F.R.C.P. 12(b). On June 24, 1996, following a hearing at which petitioner was represented by counsel, the district court granted respondents' motion, ruling that respondents were shielded by sovereign immunity, and dismissed the action.

From the transcript of the hearing it is clear that the court intended to dismiss the case as to all parties. During the hearing, counsel for petitioner recognized that the court was inclined to grant the motion to dismiss and that it would be necessary to litigate the issue of respondents' sovereign immunity on appeal. *See* Tr. of June 24, 1996 Hrg. at 10 ("I know Your Honor disagrees with our position. And so I—as I said, I think this just has to go to the Ninth Circuit and have them pass on all these issues"). At the end of the hearing, in a colloquy with counsel for petitioner, the court granted the motion to dismiss on the heels of counsel's declaration that he wanted to take the case to the Ninth Circuit (*id.* at 11):

> MR. ORD: Your Honor, I realize you've thought this out very carefully and I certainly respect your views and as I say, I think probably the best thing at this point is to—is for my client to take it up to the Court of Appeals if he wants to and try to get a definitive resolution on these doctrines.
>
> THE COURT: Well, Okay. I'm going to give you the definitive resolution at this judicial level then.
>
> MR. ORD: Yes sir.

---

by private citizens. *See id.* at 359-362. As noted, the gravamen of petitioner's complaint is that the government of Japan conspired with American prosecutors to have him extradited. Clearly, private citizens have no power to request the extradition of other citizens from foreign countries. *Cf. id.* at 362 ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce").

> THE COURT: The motion to dismiss is granted without leave to amend. The action's dismissed and I just signed the order here. My clerk will send you copies of the minute order and the order.

In the minute order to which the court referred ("the June 24 order"), the district court included a memorandum opinion clearly stating that "[t]he motion to dismiss of *all named defendants* is granted without leave to amend on the ground of sovereign immunity and *the action is dismissed* by order signed and filed this date." App., *infra*, at 1a (emphasis added).[2]

The dispute remaining in this case turns on the other order that the district court filed on June 24 and entered on June 26, 1996 ("the June 26 order"). *See* Pet. App. 4. In that order, the court said that "[t]his action is dismissed with prejudice" and that "[t]his Order is a final judgment for purposes of Fed. R. Civ. P. 54(a)." *Id.* The court's docket entries likewise reflect that this was an order "terminating case." Docket Entry No. 48. In the June 26 order (and the docket entry), however, the Japanese Ministry of Justice was omitted in the list of defendants as to which dismissal had been granted. Also, the June 26 order was captioned "order dismissing action as to *certain* defendants." Pet. App. 4 (emphasis added).

On August 20, 1996, almost two months after the district court had dismissed the action, petitioner filed a notice of appeal—well after the time for filing such a notice had expired. *See* Fed. R. App. P. 4(a)(1) (notice of appeal in a civil case where the United States is not a party must be filed within 30 days of entry of judgment); *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978) (timely notice of appeal is mandatory and jurisdictional). In his notice, petitioner recited that

---

[2] Respondents have reproduced the June 24 order in an appendix, even though petitioner did not, because it is a "relevant" opinion and order. S. Ct. R. 14.1(*i*)(ii).

he was appealing "the decision and order entered by the U.S. District Court for the Central District of California on June 26, 1996." Notice of Appeal at 1. Respondents moved to dismiss the appeal, explaining that petitioner had failed to notice his appeal within the 30-day time limit. Rather than respond directly, on October 15, 1996, petitioner, through counsel, moved for an extension of time in which to file a response. Petitioner's submission stated that his notice of appeal had been filed "within 60 days of the June 26, 1996, order." Appellant's Motion for Extension of Time to File Response to Motion to Dismiss ¶ 1. In that submission, petitioner said nothing about the omission of the Ministry of Justice from the June 26 order. On October 23, 1996, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Pet. App. 5.

Searching for a way out of the predicament he had made for himself, on November 8, 1996, petitioner filed a motion in the district court styled a "Motion for Entry of a Final Judgment." Pet. 5. In that motion, petitioner for the first time pointed out that the Ministry of Justice had not been listed in the June 26 order and took the position that, because of this omission, the district court "had not yet entered a final judgment" in this case and therefore his appeal to the Ninth Circuit was "a legal nullity." Motion for Entry of a Final Judgment ¶ 3.

On November 22, 1996, the district court denied petitioner's motion as moot and rejected his view that this case was "still alive," explaining that "[f]inal judgment in this matter was entered on June 26, 1996, dismissing the action as to all defendants then left in the case." Pet. App. 2. With respect to the omission of the Ministry of Justice in the June 26 order, the district court stated that

> the Ministry of Justice is merely a part of "The Sovereign State of Japan" and was dismissed along with all of the other agencies of the Japanese government. This was made clear in the minute order of June 24, 1996, which made it clear that the action was dis-

missed as to Japan, and all of its agencies, by reason of sovereign immunity. [*Id.* at 2-3.]

On December 17, 1996, petitioner filed a notice of appeal from the district court's November 22, 1996 order. Pet. 6. On February 26, 1997, the Ninth Circuit issued an order requiring petitioner "to show cause why summary disposition is not appropriate," noting that "this court has previously dismissed the appeal from the district court's final order for lack of appellate jurisdiction." Order of Feb. 26, 1997, at 1. On April 24, 1997, the Ninth Circuit summarily affirmed the district court's decision and explained that "[a] review of the record and appellant's response to this court's order to show cause indicates that the questions raised in this appeal are so insubstantial as not to need further argument." Pet. App. 1. On June 4, 1997, the Ninth Circuit denied what it construed as a motion by petitioner for reconsideration and also rejected petitioner's suggestion for rehearing en banc. Pet. App. 6.

REASONS FOR DENYING THE WRIT

1. The petition ought be denied, if for no other reason, because petitioner does not allege any intercircuit conflict with respect to the legal issue on which his case turns. That is, while petitioner makes a ritualistic claim of conflict, *see* Reasons for Granting the Writ Nos. 1 & 2, he is unable to point to a single court of appeals decision holding on facts similar to this case that a district court's decision was not final and appealable. Indeed, he fails to cite a single court of appeals case arising in an analogous context.

Furthermore, wholly apart from the absence of conflict, this case simply raises no "important federal question" (S. Ct. R. 10(a)) requiring resolution by this Court. Although the legal standard for determining when a district court decision is final and appealable is, no doubt, an important question, that standard—as shown below—is quite settled, and this case involves

nothing more than a fact-bound application of that standard in a context where the answer is clear.

Petitioner obviously believes that the Ninth Circuit decided this case incorrectly—which it emphatically did not. But even if it had that would not be reason enough to grant review. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.17, at 193 (7th ed. 1993) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions"). Justice Harlan's reminder that this Court does "not sit as a court of errors and appeals in state cases," *Burgett* v. *Texas*, 389 U.S. 109, 120 (1967) (Harlan, J., dissenting, joined by Black & White, JJ.), would seem to have equal force in a federal case such as this one.

2. Because the district court's June 26 order was a final and appealable judgment, petitioner's time for noticing his appeal expired long before he actually did so in August 1996. Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction of appeals from the "final decisions" of federal district courts. "For a ruling to be final, it must end the litigation on the merits, and the judge must clearly declare his intention in this respect." *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 498 U.S. 269, 273-274 (1991) (quotation marks, brackets, and footnote omitted). Thus, in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978) (per curiam), this Court held that, although the district court had failed to set forth its final judgment on a separate document in accordance with Fed. R. Civ. P. 58, the appellate jurisdiction of the court of appeals nonetheless had been properly invoked under § 1291 because "the District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case." *Id.* at 387; *see also id.* at 385 n.6 (court of appeals must "determine whether the district court intended the judgment to represent the final decision in the case").

Following this Court's lead, it is well established in the courts of appeals that a judgment is final and appealable if from the record it is sufficiently clear that it was the district court's intent to render a final judgment. *See, e.g., National Distrib. Agency* v. *Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) ("A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter") (quotation marks omitted); *Spain* v. *Gallegos*, 26 F.3d 439, 446 n.9 (3d Cir. 1994) ("the district court clearly intended that its dismissal of the case would be its final decision"); *Fiataruolo* v. *United States*, 8 F.3d 930, 937 (2d Cir. 1993) ("What essentially is required is some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as it is concerned, is the end of the case"); *Chiari* v. *City of League City*, 920 F.2d 311, 314 (5th Cir. 1991) (judgment is final "if it is apparent that the district judge intended that the judgment dispose of all the claims before him"); *F. & H.R. Farman-Farmian Consulting Eng'rs Firm* v. *Harza Eng'g Co.*, 882 F.2d 281, 283 (7th Cir. 1989) ("the judge's intent to dismiss the entire suit is plain, which is enough to satisfy the final decision rule of 28 U.S.C. § 1291") (Posner, J.), *cert. denied*, 497 U.S. 1038 (1990). The "focus [is] on the court's intent," which is inferred "from the record as a whole." *National Distrib. Agency*, 117 F.3d at 434.

Here, a review of the pertinent parts of the record leaves not a shred of doubt that the district court intended to bring this litigation to a close on June 24, 1996.

At June 24, 1996 hearing, counsel for petitioner twice expressed a desire to have the Ninth Circuit rule on the issue of respondents' sovereign immunity, *see* Tr. of June 24, 1996 Hrg. at 10, 11, so that he could "get a definitive resolution." *Id.* at 11. Acceding to counsel's wishes, the district court agreed "to give [him] the

definitive resolution at this judicial level" (*id.*) and then promptly dismissed the case with prejudice. *See id.* ("The motion to dismiss is granted without leave to amend. The action's dismissed and I just signed the order").

In the June 24 order, the court—with the unmistakable intention of terminating the litigation—stated that "[t]he motion to dismiss of *all named defendants* is granted without leave to amend on the ground of sovereign immunity and *the action is dismissed*." App., *infra*, at 1a (emphasis added). From this, it is clear that the court intended to dismiss as to the Ministry of Justice along with each of the other respondents.

That this was the district court's intent it is made not just clear, but crystal clear, from the fact that, in granting respondents' motion to dismiss, the court expressly declined to give petitioner leave to amend his complaint. App. 1a. In *Gerritsen* v. *De La Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987), plaintiff sued "the President of Mexico, the Mexican Consulate, and several consular officials and employees associated with the Mexican Consulate in Los Angeles." *Id.* at 1513. The district court sua sponte dismissed the complaint in an order concluding with the statement that "President de la Madrid is dismissed from this action with prejudice; plaintiff's complaint is dismissed for lack of subject matter jurisdiction." *Id.* at 1514. On appeal, the Ninth Circuit held that the order was appealable (even though it purported to dismiss the complaint rather than the action), explaining that "[t]he order did not grant Gerritsen leave to amend the complaint. Failure to allow leave to amend supports an inference that the district court intended to make the order final." *Id.*

In short, it is impossible to read the June 24 order and not understand that petitioner had just lost the case and every respondent had won. Petitioner, in fact, concedes that the June 24 order indicates that the motion to dismiss was granted as to all of the respondents. Pet. 4.

In the face of this clarity of intent, petitioner relies on the June 26 order. That document, however, cannot carry the day for him. In the June 26 order, the district court expressly stated that "[t]his Order is a *final judgment* for purposes of Fed. R. Civ. P. 54(a)." Pet. App. 4 (emphasis added). And as significant as the emphasized language is the court's tell-tale invocation of Rule 54(a). That rule applies to "any order from which an appeal lies." Pet. App. 7. Thus, the court's reference to Rule 54(a) is a sure sign that it understood its order to be an appealable—meaning final—order. Finally, the docket entry concerning the June 26 order reflects the court was "terminating [the] case" with that order.

In light of the clear evidence of the district court's intent, the court's inadvertent omission of the Ministry of Justice from the June 26 order does not mean that the order was not final. The court's clear intent trumps any ambiguity created by this clerical oversight. *See Witherspoon* v. *White*, 111 F.3d 399, 401-402 (5th Cir. 1997) ("In circumstances in which a court order is ambiguous as to what parties and claims are being disposed of and the district court intended to effect a final dismissal of a claim, we will construe its order accordingly, despite ambiguous language that might indicate otherwise") (quotation marks, ellipses, and brackets omitted). The fact that the order was styled as one dismissing the action as to "certain" defendants (Pet. App. 4), can be explained by the fact that two of the original defendants—Middleton and Bowers—had already been dropped from the case.

Petitioner's own conduct, moreover, demonstrates that he understood the district court's June 26 order as a final order. In the nearly two months between June 26 and August 20, 1996, petitioner filed nothing and moved for nothing in the district court. Then, on August 20, he filed a notice of appeal—hardly the action of a litigant who believes the time for appeal has not yet commenced to run. It was not until after his appeal had been dis-

missed that petitioner was struck with the remarkable epiphany that his notice of appeal had been filed, not too late, as the Ninth Circuit thought, but too soon.

Petitioner argues (Pet. 13-16) that the June 26 order was not final and appealable because it did not satisfy the certification requirements of Rule 54(b), the rule governing a court's entry of "a final judgment as to one or more but fewer than all of the claims or parties." Pet. App. 7. The problem with this argument is that it rests on the incorrect premise that the district court intended to grant final judgment to fewer than all of the parties. As shown above, the district court's obvious intention was to enter final judgment as to all parties. In particular, the court's citation in the June 26 order of Rule 54(a)—the rule applicable to final, appealable judgments—makes clear that the court was not proceeding under Rule 54(b).

It should also be noted that petitioner does not even attempt to offer a theory why the district court might have intended to dismiss the case as to every defendant except for the Ministry of Justice. The motion to dismiss for reasons of sovereign immunity was brought by all respondents, including the Ministry of Justice. Neither respondents in their motion nor petitioner in his reply made any argument that the motion should be granted (or denied) as to fewer than all respondents. And the reasons the district court gave in the June 24 order for granting the motion provide no basis for thinking that it was granted as to some, but not all, respondents. In other words, there is not a single reason to believe that the omission of the Ministry of Justice from the June 26 order was anything but inadvertent.

Furthermore, this is not a case in which one must guess the intent of the district court. Here, we know that the court intended the June 26 order to be final because we have its actual views on the subject. Following the Ninth Circuit's dismissal of his first appeal, petitioner returned to the district court and moved for entry of a

final judgment. The district court, however, explained that "[f]inal judgment in this matter was entered on June 26, 1996, dismissing the action as to all defendants then left in the case." Pet. App. 2. Thus, there can be no question about the court's intent since the court has explained what it was.

Petitioner asserts that, because of his lack of facility with English, he was "confused" by the June 26 order. Pet. 5. An untimely notice of appeal cannot be excused, however, even in the case of a pro se litigant. The equities, moreover, are hardly on petitioner's side. Petitioner states that he was represented by counsel at the time the district court dismissed the case. Pet. App. 17. Upon learning that his case had been dismissed, he could have easily at that time asked counsel when his notice of appeal was due.

There were also certain procedural steps petitioner could have taken to dispel, and protect himself from, any confusion from which he may have suffered. First, if petitioner was not sure whether the time to appeal had started to run, he could have filed a protective notice of appeal, any dismissal of which would have been without prejudice to him. Second, if petitioner did not know whether the omission of the Ministry of Justice from the June 26 order was a mere scrivener's error, he could have sought an answer by moving under Rule 60. *See* Fed. R. Civ. P. 60(a) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party"); *see also Hasbrouck* v. *Texaco, Inc.*, 879 F.2d 632, 636 (9th Cir. 1989) ("A court's failure to memorialize part of its decision is a clerical error"). Petitioner did neither of these things.

3. In denying petitioner's motion for entry of judgment, the district court explained that the Ministry of Justice had not been left out of its June 26 order because "the Ministry of Justice is merely a part of 'The Sover-

eign State of Japan' and was dismissed along with all of the other agencies of the Japanese government." Pet. App. 2-3. Petitioner argues that this explanation conflicts with this Court's admonition that for purposes of the FSIA "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983); *see* Pet. 10. He did not, however, raise this argument in the court below,[3] and therefore it should not be considered for the first time by this Court. *See, e.g., Ryder* v. *United States*, 515 U.S. 177, 186 (1995). In any event, the Ministry of Justice is not a "juridical entit[y] distinct and independent" from the Sovereign State of Japan itself.

The FSIA draws a distinction for certain purposes between, on the one hand, a "foreign state," a term that "includes a political subdivision of a foreign state," and, on the other hand, an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603.[4] All of the cases on which petitioner relies[5] involved government-owned corporations, which are treated as agencies or instrumen-

---

[3] *See* Appellant's Response to Order to Show Cause Why Summary Disposition is Not Appropriate; Appellant's Supplemental Response to Order to Show Cause Why Summary Disposition is Not Appropriate; Appellant's Reply to Appellee's Filing Pursuant to the Court's Feb. 26 Order. Appellant did raise the argument in the "Opening Brief" he sent to the Ninth Circuit but the Ninth Circuit, as explained in Point 4 below, properly did not consider that brief.

[4] Thus, the FSIA prescribes a different mode of service upon foreign states and political subdivisions thereof than upon agencies and instrumentalities of foreign states. *See* 28 U.S.C. § 1608.

[5] *See* Pet. 9, 12 (citing *First City National Bank, supra*; *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996); *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989); *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559 (11th Cir. 1987); *Gibbons* v. *Republic of Ireland*, 532 F. Supp. 668 (D.D.C. 1982)).

talities under the FSIA. *See id.* § 1603(b). The Japanese Ministry of Justice, however, is not an agency or instrumentality within the meaning of the FSIA but rather a political subdivision of a foreign state. *See Unidyne Corp.* v. *Aerolineas Argentinas*, 590 F. Supp. 398, 400 (E.D. Va. 1984) ("A political subdivision of a foreign state includes all governmental units beneath the central government"). Thus, in *Unidyne* the court held that the Argentine Naval Commission ("ANC")—a department of the Argentine Navy—was a political subdivision of Argentina for purposes of the FSIA.[6] In so doing, the court observed that "[t]he ANC is part and parcel of the Argentine Navy * * * The ANC has no life other than that derived from Argentina; rather the agency is Argentina * * *, not an entity independent of it." *Id.*

So too here, the Japanese Ministry of Justice is properly viewed as "part and parcel" of the Sovereign State of Japan. Accordingly, the district court's dismissal of the case with respect to the Japanese government is correctly understood as a dismissal with respect to the Ministry of Justice. *Cf. Martinez* v. *Winner*, 771 F.2d 424, 442 (10th Cir. 1985) ("the Department of Justice was properly dismissed as a named defendant, if for no other reason, because it is not a juridical entity separate from the United States"), *vacated & remanded to consider question of mootness sub nom. Tyus* v. *Martinez*, 475 U.S. 1138 (1986), *judgment vacated as moot*, 800 F.2d 230 (10th Cir. 1986).[7]

---

[6] *See also Gerritsen*, 819 F.2d at 1517 (Mexican Consulate is a foreign state); *Tucker* v. *Whitaker Travel, Inc.*, 620 F. Supp. 578, 581 (E.D. Pa. 1985) (Bahamian Ministry of Tourism is a foreign state), *aff'd*, 800 F.2d 1140 (3d Cir.) (table), *cert. denied*, 479 U.S. 986 (1986). *But see Behring Int'l, Inc.* v. *Imperial Iranian Air Force*, 475 F. Supp. 396, 403 (D.N.J. 1979) (concluding, without discussion or analysis, that Iranian Air Force is an agency or instrumentality).

[7] Although the Tenth Circuit on remand from the Supreme Court vacated its judgment in the case on mootness grounds, the court denied a request to vacate its published opinion, saying that

4. Finally, petitioner asks this Court to exercise its supervisory power over the court below for its failure to consider his opening brief. Pet. 17. The Ninth Circuit did nothing to warrant the exercise of that power.

On February 26, 1997, following receipt of petitioner's notice of appeal from the district court's November 8, 1996 order, the Ninth Circuit—after reviewing the record and determining that it had previously dismissed petitioner's appeal from the district court's June 26 order—directed petitioner to show cause why summary disposition was not appropriate. In March 1997, petitioner filed a response to the show cause order, a supplemental response, and a reply to respondents' submission with respect to the order. After considering these submissions, the Ninth Circuit summarily affirmed on April 24, 1997. Pet. App. 1. Because the Ninth Circuit determined that petitioner had failed to make the showing necessary to avoid summary disposition, the court had no need, and was under no obligation, to consider petitioner's opening brief, which was filed on April 18, 1997. Petitioner had ample opportunity to explain why summary disposition was inappropriate and simply was unable to do so in three filings.

Petitioner also complains that the Ninth Circuit construed his petition for rehearing as a motion for reconsideration under Ninth Circuit Rule 27-10 in—he alleges—an "apparent" effort to circumvent the en banc review process. Pet. 17. Rule 27-10 applies to motions for "clarification, reconsideration, or rehearing of an order entered by a motions panel." Pet. App. 10. The Ninth Circuit's summary affirmance order of April 24, 1997, appears to have been issued by a motions panel.[8]

---

the opinion "may be useful to someone in the future." 800 F.2d at 231.

[8] The show cause order issued by the Ninth Circuit on February 26, 1997, was signed by "Song Hill, Motions Attorney/Deputy Clerk."

There is no reason to believe that the Ninth Circuit failed to follow correct procedure in this instance. Nor is there any reason to believe that petitioner's suggestion for rehearing en banc failed to receive the consideration it was due. *See* Pet. App. 6 ("reject[ing]" the suggestion). Review of the Ninth Circuit's internal operating procedures surely is not warranted in this case.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

WILLIAM A. BRADFORD, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5660
Counsel for Respondents

* Counsel of Record

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES–GENERAL

Case No. CV 94-2401 HLH (Rcx) Date June, 24, 1996

Aizawa v. *The Sovereign State of Japan, et al.*

DOCKET ENTRY:

PRESENT:

HON. HARRY L. HUPP, JUDGE
Milli Borgarding, Deputy Clerk
C. Mizell, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Edward Ord ✓

ATTORNEYS PRESENT FOR DEFENDANTS:

Christopher Kelly
Wm. Bradford ✓

PROCEEDINGS:

Defendants' Motion to Dismiss;
Review of order of Magistrate Judge

ORDER (also, if applicable, findings and memorandum opinion):

The objection to the order of the Magistrate Judge allowing additional time to respond to the complaint is overruled. The motion to dismiss of all named defendants is granted without leave to amend on the ground of sovereign immunity and the action is dismissed by order signed and filed this date.

The objection to the order of the Magistrate Judge allowing defendants time to respond to the complaint is overruled. The decision to allow additional time could not by any stretch of the imagination be termed an abuse of discretion or "clearly erroneous." Plaintiff's claim that this request for default should have been entered before the order was granted is equally without merit. A request for default which does not set forth the identity of the defendants as to whom default is requested is hardly deficient for mere technical errors, allowing relation back to the date of the original request. In any event, sovereign immunity is a question which must be considered even if default had been entered and not set aside, an unlikely event.

On the merits, the complaint shows conclusively that sovereign immunity has not been waived, and that no amended complaint could cure that defect.

Plaintiff's complaint is that he was arrested based on the request of Japan for extradition to serve a criminal sentence, which request was repeated twice. The extradition requests were denied on the basis that the extradition treaty only calls for extradition for a crime which would also be a crime in this country. Finding that the essence of the Japanese crime committed by plaintiff was the payment of campaign workers in violation of Japanese law, extradition was refused because such was not a crime in this country.

The complaint plainly comes under the sovereign immunity provisions of the Foreign Sovereign Immunities Act (FSIA). The waiver of sovereign immunity for a non-commercial tort does not include "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" (28 USC § 1605(a)(5)(B)). This directly excludes plaintiff's first, second, and third claims. The remaining claims (infliction of emotional distress and negligence) plainly arise from conduct which is an excluded tort and are therefore themselves excluded (*Sheehan* 9Cir'90 917

F2d 424; *Thomas-Lazear* 9Cir'88 851 F2d 1202). In addition, the alleged torts are excluded from waiver because they arise from the sovereign's discretionary function (28 USC §1605(a)(5)(A)).

The other claimed grounds of waiver have no merit. Defendants did not waive sovereign immunity by making an appearance without filing a motion or answer. Requesting extradition from the United States courts does not waive sovereign immunity. *Siderman* 9Cir'92 965 F2d 699 cannot be interpreted to say that any extradition request in regular form pursuant to treaty is a waiver of sovereign immunity for a subsequent malicious prosecution action.

The action is dismissed.

Supreme Court, U.S.
FILED
SEP 25 1997
CLERK

No. 97-161

In The

Supreme Court of the United States

October Term, 1996

MASAMI AIZAWA,

Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN; THE JAPANESE MINISTRY OF JUSTICE; THE JAPANESE MINISTRY OF FOREIGN AFFAIRS; THE SUPREME PROSECUTOR'S OFFICE OF JAPAN; THE ISHINOMAKI DISTRICT PUBLIC PROSECUTOR'S OFFICE; THE SENDAI HIGH PUBLIC PROSECUTOR'S OFFICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street
Suite 1055
San Francisco, CA 94104
(415) 274-3800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

RESPONDENTS' OPPOSITION IS NONRESPONSIVE TO THE JURISDICTIONAL AND PROCEDURAL ISSUES OF TREMENDOUS SIGNIFICANCE RAISED HEREIN UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE FEDERAL RULES OF CIVIL PROCEDURE.. 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 5

Edlow International Co. v. Nuklearna Elektrarna Krsko, 441 F.Supp. 827 (D.C.D.C. 1977) 5

First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 1

Hoover v. U.S. Department of Interior, 611 F.2d 1132 (5th Cir. 1980) 7

Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500 (9th Cir. 1994) 5

Long v. U.S. Internal Revenue Service, 693 F.2d 907 (9th Cir. 1987) 7

Lykins v. U.S. Department of Justice, 725 F.2d 1455 (D.C. Cir. 1984) 6

Martinez v. Winner, 771 F.2d 424 (10th Cir. 1985) 6

Scheuer v. Rhodes, 416 U.S. 232 (1974) 5

Sears, Roebuck and Co. v. Mackey, 351 U.S. 427 (1956) 2

Spannus v. U.S. Department of Justice, 824 F.2d 52 (D.C. Cir. 1987) 6

Yessenin-Volpin v. Novosti Press Agency, 443 F.Supp. 849 (S.D.N.Y. 1978) 4, 5

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1603(b)(2) 4

28 U.S.C. § 1610(b) 6

Fed. R. Civ. P. 54(b) 1, 2, 3, 4

H.Rep. No. 94-1487, 94th Cong., 2d Sess. 15-16 (1976) 4

ARGUMENT

RESPONDENTS' OPPOSITION IS NONRESPONSIVE TO THE JURISDICTIONAL AND PROCEDURAL ISSUES OF TREMENDOUS SIGNIFICANCE RAISED HEREIN UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE FEDERAL RULES OF CIVIL PROCEDURE

Respondents' Opposition to Petitioner's July 24, 1997, Petition for Writ of Certiorari is entirely nonresponsive to the jurisdictional and procedural issues of tremendous national and international significance raised in the Petition. Respondents' characterization of the Petition as a "last second 'Hail Mary' pass" unduly trivializes both Rule 54(b) of the Federal Rules of Civil Procedure, as well as the unequivocal intent of Congress in enacting the Foreign Sovereign Immunities Act (hereinafter "FSIA"), under which duly created agencies or instrumentalities of a foreign state are to be accorded a presumption of independent status. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) ("*Bancec*").

With respect to Fed. R. Civ. P. 54(b), Respondents' contention on page 7 of their Opposition, that Petitioner has not raised any intercircuit conflict because he has not "point[ed] to a single court of appeals decision holding on facts similar to this case that a district court's decision was not final and appealable," is entirely without merit. Petitioner on pages 13-15 of his Petition cites a bevy of cases from other circuits holding that a district court order which disposes of fewer than all of the claims in an action, or the rights and liabilities of fewer than *all* of the parties to the action, is not a final judgment absent compliance with Rule 54(b) certification by the district court.

Here, there is no question that the district court's June 26, 1996, order of dismissal fell within the ambit of Rule 54(b) because it disposed of "the rights and liabilities of fewer than all of the parties" due to the district court's failure to dismiss the action as to the Japanese Ministry of Justice. Accordingly, Fed. R. Civ. P. 54(b) applied to the order. Because the order did not meet the mandatory certification requirements imposed by Fed. R. Civ. P. 54(b), it was not final and appealable. This ends the inquiry, and the Ninth Circuit's decision to the contrary is in direct conflict with the above-mentioned cases from other circuits cited in the Petition.

Moreover, the Ninth Circuit's decision is also in direct conflict with this court's decision in *Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427, 435 (1956), where this Court made it abundantly clear that the overriding policy behind Fed. R. Civ. P. 54(b) is to provide litigants in federal court with *certainty* regarding the time for filing a notice of appeal:

> A party adversely affected by a final decision thus knows that his time for an appeal will not run against him until this [Rule 54(b)] certification has been made.

Here, the Ninth Circuit's decision, due to its failure to uphold Fed. R. Civ. P. 54(b)'s mandatory certification requirements, deprived Petitioner, a non-English speaking Japanese citizen who is unfamiliar with U.S. court procedures, of this "time for appeal" certainty to which he is entitled.

Stripped of all of its rhetoric, Respondents' argument with respect to Fed. R. Civ. P. 54(b) essentially boils down

to the following position: Because the district judge intended something, i.e., the dismissal of an action as to all of the defendants, then the Federal Rules of Civil Procedure can be ignored and the time for Petitioner's appeal began to run as of the date of the district judge's undisclosed intention to dismiss the action as to all defendants. Contrary to Respondents' position, however, intent is not the law. If it were, then this would generate massive confusion for appellate litigants in federal courts across the country. They would never know when to file a notice of appeal without first ascertaining the intent of the district judge.

Here, Petitioner was confused by the district court's June 26, 1996, order dismissing his action as to only "certain" defendants, and this confusion led him to file his notice of appeal, in a pro per capacity, early. While Respondents cite, on page 4 of their Opposition, an excerpt from the June 24, 1996, hearing on their motion to dismiss wherein the district judge informed undersigned counsel that he would provide a "definitive resolution," this is altogether nonresponsive to the fact that two days later, the district court generated substantial confusion for Petitioner by entering an order which did *not* dismiss Petitioner's action as to all named defendants and which lacked the required Fed. R. Civ. P. 54(b) certification. It was not until November 22, 1996, when the district judge denied Petitioner's motion for entry of a final judgment, that he finally made it clear that his intention had been to dismiss the action as to all parties. The burden was on the district judge, however, and not Petitioner, to either draft a clear and unambiguous order of dismissal covering all parties at the outset, or else comply with Fed. R. Civ. P.

54(b)'s certification requirements. Such a prophylactic rule is essential to the preservation of valuable appellate rights.

As to Respondents' contention that the Japanese Ministry of Justice is not a separate juridical entity under the FSIA, this is also entirely without merit. In enacting the FSIA, Congress specifically contemplated that the separate ministries of foreign sovereigns, such as Respondent the Japanese Ministry of Justice herein, would fall within the Act's broad and sweeping definition of "agency or instrumentality":

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including . . . a department *or ministry* which acts and is suable in its own name. [Emphasis added].

H.Rep. No. 94-1487, 94th Cong., 2d Sess. 15-16 (1976).

Respondents' attempt to categorize the Japanese Ministry of Justice as a "political subdivision" rather than an agency or instrumentality is disingenuous. While many of the reported "agency or instrumentality" cases under the FSIA involve corporations owned by foreign sovereigns, a non-corporate organ of a foreign state also falls within the definition of agency or instrumentality. 28 U.S.C. §1603(b)(2); Also see, e.g., *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978) [holding that both TASS ("Telegraph Agency of the Soviet Union of the USSR Council of Ministers") and Novosti Press Agency were agencies or instrumentalities of the Soviet Union]. Here, the Japanese Ministry of Justice clearly falls within the "non-corporate organ of a foreign

state" category of foreign agencies or instrumentalities, as it discharges its own separate governmental function which is distinct from the functions of other agencies, such as Respondent the Japanese Ministry of Foreign Affairs. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F.Supp. 827, 832 (D.C.D.C. 1977).

Ultimately, as in *Novosti* and *Edlow*, the issue of whether the Japanese Ministry of Justice is an agency or instrumentality of Japan under the FSIA turns upon Japanese law. However, for purposes of the narrow issue involved herein regarding the propriety of the Ninth Circuit's dismissal of Petitioner's appeal, the contents of Petitioner's pleadings are to be taken as true and are to be construed in the light most favorable to the non-moving party. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974); *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994).

Because Petitioner named, pled, and served (under the applicable long-arm statute) the Japanese Ministry of Justice as a separate juridical-entity defendant, and none of this, including the service of process, has been contested by Respondents, the Japanese Ministry of Justice must be treated as a separate juridical entity for purposes of the present proceedings. We are still at the pleading stage, and this presumption has no bearing on whether or not subject matter jurisdiction exists under the FSIA for Petitioner's underlying action against Respondents.

Moreover, Petitioner specifically named the Japanese Ministry of Justice as a separate party defendant, due to the fact that under the FSIA, a judgment against one

agency of a foreign sovereign is, in many instances, not enforceable by way of execution against the property of another agency of the same sovereign. 28 U.S.C. §1610(b). Thus, due to this disparate treatment in enforceability of judgments under the FSIA, Petitioner was entitled to name the Japanese Ministry of Justice as a separate party in his complaint. Respondents' assertion on page 15 of their Opposition that the Japanese Ministry of Justice was merely "part and parcel" of the Sovereign State of Japan therefore competely ignores the special treatment Congress has accorded foreign agencies under the FSIA for purposes of enforcing judgments.

Respondent cites *Martinez v. Winner*, 771 F.2d 424, 442 (10th Cir. 1985) on page 15 of its Opposition for the proposition that the U.S. Department of Justice is not a separate juridical entity. This simply does not address the fact that under the FSIA, Congress intended separate ministries of foreign governments, such as the Japanese Ministry of Justice herein, to be treated as distinct agencies or instrumentalities. See the above quote from the FSIA's legislative history. In addition, Respondents have introduced no evidence whatsoever in the proceedings below to show that the Japanese Ministry of Justice is not an agency or instrumentality under the FSIA. Accordingly, Petitioner's treatment of it as such is deemed to be true at this stage of the proceedings. Finally, there are a substantial number of cases holding that the United States' executive departments, including The Department of Justice, are separate agencies and can be sued in their own separate capacities. See, e.g., *Spannus v. U.S. Department of Justice*, 824 F.2d 52 (D.C. Cir. 1987); *Lykins v. U.S. Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984);

Hoover v. U.S. Department of Interior, 611 F.2d 1132 (5th Cir. 1980); *Long v. U.S. Internal Revenue Service,* 693 F.2d 907 (9th Cir. 1987).

CONCLUSION

Petitioner is a non-English speaking citizen of Japan, a nation which is one of the United States' largest trading partners, and a nation which is also the United States' partner in defense by virtue of the new defense treaty signed by both sovereigns. If we as a nation desire the Japanese to treat our citizens fairly in their courts, then it is incumbent upon us to reciprocate by providing like treatment to their citizens who are involved in disputes in our courts. We must begin by following our own procedural rules, statutes, and case precedent.

The petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street
Suite 1055
San Francisco, CA 94104
(415) 274-3800